which has grown out of an attempt to distinguish between acts committed by them in the performance of governmental functions and those committed while acting in a so-called private capacity.[13]

STOCKHOLDERS' SUITS IN BEHALF OF THE CORPORATION FOR WRONGS OF THE DIRECTORS TO THE CORPORATION.—The directors of a corporation, while having the power of management of the corporation and the control of the corporate property, are not true trustees either in regard to the corporation or to the stockholders, for the legal title to the corporate property is not in them. But their position in regard to these things has for obvious reasons created them quasi-trustees towards the corporate body with respect to the corporate property and towards the stockholders with respect to their shares of stock.[1] Towards the latter, however, there is no trust relation of any kind as regards the control and management of the corporate property, in as much as a shareholder does not, by virtue of ownership of shares of stock, acquire any estate, legal or equitable, in the property of the corporation.[2] So, as a general rule, in equity as well as at law, redress for wrongs against the corporate body must be sought in a suit by the corporation.[3] The duty of taking steps to do this devolves upon the directors, who, except where corporate action is decreed by the stockholders, are the mentors and originators of any action of the corporation. But the frequent occasions where the wrong is by the directors would necessitate the somewhat anomalous position of the directors acting to have a suit brought against themselves to redress wrong occasioned by their own misconduct. Courts of equity recognizing this state of affairs will, under some conditions, entertain suits brought by stockholders in behalf of the corporation.[4]

There are apparently two lines of reasoning upon which the courts proceed in allowing this relief. The first is deduced from the familiar doctrine that equity, in a proper case, will look beyond the corporate body as a legal entity distinct from its members and, disregarding the fiction, will recognize the fact that a corpora-

[13] See "THE NATURE OF GOVERNMENTAL FUNCTIONS," 1 VA. L. REV. 497.

[1] Pomeroy, EQUITY JURISPRUDENCE, 3rd ed., § 1090.

[2] Bradley *v.* Holdsworth, 3 Mees. & W. 422; Reg. *v.* Arnaud, 9 Q. B. 806; Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209; Williamson's Syndics *v.* Smoot, 7 Martin (La.) 31, 12 Am. Dec. 494; Button *v.* Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.

[3] Foss *v.* Harbottle, 2 Hare 461; McDougall *v.* Gardiner, 2 Ch. D. 13; Hawes *v.* Oakland, 104 U. S. 450; Dunphy *v.* Travelers' Newspaper Asso., 146 Mass. 495, 16 N. E. 426; Strout *v.* United Shoe Co., 215 Mass. 116, 102 N. E. 312.

[4] Bagshaw *v.* Eastern Union R. Co., 7 Hare 114; Continental Securities Co. *v.* Belmont, 206 N. Y. 7, 99 N. E. 138; Woolsey *v.* Dodge, 18 How. 331; Endicott *v.* Marvell, 81 N. J. Eq. 378, 87 Atl. 230; Beckett *v.* Planter's, etc., Co. (Miss.), 65 South 275; Sheehy *v.* Barry, 87 Conn. 656, 89 Atl. 259. Moreover it is a primary essential that the suit be brought in behalf of the corporation and not for the direct benefit of the stockholder, although the ultimate effect is to benefit the stockholder. Converse *v.* United Shoe Machinery Co., 209 Mass. 539, 95 N. E. 929.

tion is an association of individuals for the purpose of private gain.[5] The stockholders as the real parties in interest and as the sole ultimate beneficiaries are heard to speak. The fact that their rights are really, though indirectly, protected by remedies given the corporation and that the final object of suits by the corporation is to maintain the interests of the stockholders allows them to have a standing in court in this instance.[6] The other grounds upon which relief is granted may be said to rest upon the broad principle that equity will suffer no wrong to be without a remedy. The wrongful acts of the directors to the corporation cry for a remedy, and a stockholder as the most appropriate person to speak, is heard to complain in behalf of the corporation. The suit is in all other respects as if brought regularly by the corporation, and the shareholder is simply the instrument whereby the machinery of the courts is set in motion in order to prevent a flagrant failure of justice.[7] So, since it is the corporation's suit, instituted by a stockholder only because the circumstances under which the corporate body labors prevent it from so doing, it is necessary that the corporation be joined as a party to the suit.[8]

The gist of stockholders' suits in behalf of the corporation against the directors for injuries to the corporate property lies in the fact that the corporation is helpless; the inability of the corporation to speak for itself gives rise to the right of the stockholders to speak in its behalf. Therefore in all these suits it is a condition precedent to the hearing of the complaint that the remedy of the courts will not be sought by the corporation; that the corporate organization designed to take these steps refuses to act. There must be clear allegation and proof that application has been made to the directors and stockholders, and that they have refused to sue, or that the facts show that such application would be fruitless.[9] As a salu-

[5] State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145; Donovan *v.* Purtell, 216 Ill. 629, 75 N. E. 334.

[6] Pomeroy, EQUITY JURISPRUDENCE, 3rd. ed., § 1095. See also, Slattery *v.* St. Louis, etc., R. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245. Though the courts follow this line of reasoning solely, the requirement that the corporation be joined a party is not dispensed with.

[7] Under both these reasons the ultimate result is the same. The distinction therefore becomes purely academical, except probably as to some incidents of the relief, as the defense of laches by the stockholder desiring to have judicial inquiry of the wrong. Laches by the plaintiff, it is well settled, bars the relief sought by him in behalf of the corporation. Dimpfell *v.* Ohio, etc., R. Co., 110 U. S. 209; Dunphy *v.* Travelers Newspaper Asso., *supra;* Alexander *v.* Searcy, 81 Ga. 536, 12 Am. St. Rep. 337. Were the sole grounds for entertaining the suit the second line of reasoning, it might be questioned as to the propriety of the application of the doctrine of laches when the shareholder alone is the guilty party. In these suits the corporation is from its nature and the circumstances hardly able to be guilty of laches and the complainant stockholder is merely a means by which the court allows itself to take judicial notice of the wrong to the corporation thus incapacitated to do so.

[8] 3 Pomeroy, EQUITY JURISPRUDENCE, 3rd ed., § 1095; 3 Cook on CORPORATIONS, 7th ed., § 738.

[9] Foss *v.* Harbottle, *supra;* Hawes *v.* Oakland, *supra;* Brewer *v.* Boston Theater Co., 104 Mass. 378.

tary check upon multifarious stockholders' suits, allegation and proof of an actual or virtual refusal of the managers and controllers of the corporation to take steps in bringing complaint for the wrong, is required with much severity. This is illustrated by the recent case of *Bartlett* v. *New York, N. H. & H. R. Co.* (Mass), 109 N. E. 452, where a demurrer to a bill to enforce the personal liability of the directors for their negligent dissipation of the corporate property, was sustained. The bill failed to show that a majority of the directors controlled the corporation, or that the proper application had been made and sufficient time given for them to act. It is probable that the directors had acted fraudulently in dissipating the corporate funds and that upon the merits relief was proper, but, since it was not shown that the corporation itself could not seek the remedy, since the bill did not set forth that the proper parties to institute the suit, the directors, had either actually or virtually refused to take action to have the corporation sue, the defendants' demurrer was sustained. The right to complain did not lie in the mouth of a stockholder under these conditions.

Following the principles already enunciated, that the suit is that of the corporation, it is manifest that suits commenced by a stockholder under these conditions can only be maintained where the corporation as plaintiff could have complained. Only where the wrong to the corporation is illegal, fraudulent, oppressive or *ultra vires* will the relief sought be granted.[10] A stockholder in so becoming agrees to submit to the rule of the majority of his associates, and as long as they are not acting fraudulently or *ultra vires* he has no right to complain. The business policy and management of a corporation are matters within the discretion of the managers thereof. Interference of the courts extends only to illegality inflicted or threatened; it is not their duty to supply the prudence, knowledge, or forecast, requisite to successful business management. While any harmful acts of the directors accentuated by fraud or oppression give a stockholder ground to speak under circumstances showing acquiescence of the majority of the stockholders therein, *ultra vires* acts without the extenuating facts of fraud entitle a stockholder to institute suits for preventative and remedial relief.[11] It is a transcendence of the legitimate function of the corporate body, and the corporation is wronged thereby.

---

[10] Macdougall *v.* Gardiner, *supra;* Dudley *v.* Kentucky High School, 9 Bush (Ky.) 576; Sewell *v.* Cape May Beach Co., 50 N. J. Eq. 717, 25 Atl. 929; Leslie *v.* Lorillard, 110 N. Y. 519.

[11] Bagshaw *v.* Eastern Counties R. Co., *supra;* Dodge *v.* Woolsey, *supra;* March *v.* Railroad, 43 N. H. 515. An act *ultra vires* as to the directors but *intra vires* as to the corporation or, in other words, the directors acting out of the scope of their authority, must not be confused with an *ultra vires* act of the corporation or the case of the directors with the acquiescence of a majority of the stockholders acting as they may not legally do. In the former case there can be no stockholders' suit, for ratification by a majority of the shareholders may obliterate any illegality in the act of the directors. Foss *v.* Harbottle, *supra.*

In general, it may be said that while the enormous authority on this subject seems in accord, there is confusion in the reasoning of some of the courts and in especial the guiding principle, that these suits are in reality the corporation's suits, is not always kept clear in mind.

RIGHTS AND LIABILITIES OF A CITY ARISING FROM THE DIVERSION OF NAVIGABLE STREAMS.—The question of a city's right to divert water from a navigable stream is in some confusion, due to a failure of the courts to observe strictly the clear distinction between the law of navigable or public streams and the law of unnavigable or private streams. In the case of the former, added to the privileges of the individual riparian owner, a municipal corporation as such an owner derives further rights from the fact of its relation to the public welfare and from the powers inherent in bodies for public service on principles of eminent domain.

The rule concerning unnavigable or private streams is that every owner of land on such a watercourse is entitled to the enjoyment and use of the stream according to its natural flow, subject only to such interruptions as are necessary in its proper use by other owners.[1] But if an upper proprietor use an unusual amount of water or divert the stream, he will be liable to the lower riparian owner.[2] And the same rule applies to navigable or public streams so far as the riparian owners are private persons, as they must each exercise their rights thereto subject to the rights of other riparian proprietors and the public.[3] A city or municipality, as a riparian proprietor, has no greater right in an unnavigable stream than an individual owner. Therefore, when the natural flow of a private stream has been diminished by a diversion of the water by a city for public use without due process of law and without having acquired a prescriptive right to divert the same, the riparian owners injured thereby may maintain an equitable action for an injunction and damages.[4]

But the bed and waters of navigable rivers belong to the state and are held in trust for the public.[5] And any rights individuals may have in the stream are not permitted to interfere with the public use of the waters for navigation.[6]

---

[1] Ware *v.* Allen, 140 Mass. 513, 5 N. E. 629; Dumont *v.* Kellogg, 29 Mich. 420; Red River Rolling Mills *v.* Wright, 30 Minn. 249, 15 N. W. 167; Carpenter *v.* Gold, 88 Va. 551, 14 S. E. 329.

[2] Ware *v.* Allen, *supra;* Carpenter *v.* Gold, *supra.*

[3] Ockerhausen *v.* Tyson, 71 Conn. 31, 40 Atl. 1041.

[4] Deisler *v.* City of Johnstown, 24 N. Y. App. Div. 608, 48 N. Y. Supp. 683; Sparks Mfg. Co. *v.* Town of Newton, 57 N. J. Eq. 367, 41 Atl. 385; Emporia *v.* Soden, 25 Kan. 588, 37 Am. Rep. 265.

[5] State *v.* Korrer (Minn.), 148 N. W. 617; Taylor *v.* Comm., 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865; Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606. See 2 VA. L. REV. 220.

[6] Hart *v.* City of Albany, 6 Wend. (N. Y.) 571. See Ang. on WATERS, 4th ed., § 555.